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IN THE SUPREME COURT

OF THE

UNITED STATES

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THE PEOPLE OF THE STATE OF CALIFORNIA AND THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Appellants,

vs.

MAURICE JOHN KEENAN,

Appellee.

On Appeal from the Supreme Court of California

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Can a state court, consistent with the First and Fourteenth Amendments to the United States Constitution, automatically preclude the public, including public prosecutors, from attending criminal proceedings when a defendant seeks court-appointed counsel?

2. Does the public have a First Amendment constitutional right to know the identity of court-appointed, publicly paid defense counsel in criminal cases, or may the court secretly appoint such counsel *in camera* via *ex parte* proceedings?

3. Under the First and Fourteenth Amendments, may a state court, absent any legislative authority, order that judicial records on the appointment of criminal defense counsel be sealed as "confidential"?

4. Are the People in a criminal case entitled to notice and the opportunity to be heard on the need for two court-appointed defense attorneys in that case?

5. Does it violate due process law for a state court to create a presumption that two defense attorneys are needed in a class of criminal cases, yet deny the People the opportunity to rebut the presumption by having the defense motion made in a secret court session?

PARTIES

The parties in this case are:

The People of the State of California and the Superior Court of the State of California in and for the City and County of San Francisco -- Appellants.[1/]

Maurice John Keenan -- Appellee.

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1. The opinion of the California Supreme Court states that court's determination that "the People should not be a real party in interest." Keenan v. Superior Court (1982) 31 Cal.3d 243, 247 n.5; 31 Cal.3d 424, 428 n.5; 640 P.2d 108, 110 n.5. But, "[w]here as a result of the very litigation in question, the constitutional rights of one not a party would be impaired, and where he has no effective way to preserve them himself, the Court may consider those rights as before it." United States v. Raines, 362 U.S. 17, 22 (1960); see N.A.A.C.P. v. Alabama (1958) 357 U.S. 449, 459-460; Burrows v. Jackson, 346 U.S. 249, 257 (1953). As a result of this very litigation, the People's constitutional rights are abridged without effective means of redress. Hence, they have standing to raise their interest in the due observance of the constitutional guarantees of freedom of the speech and press before this Court. United States v. Raines, 362 U.S. supra at 22.

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The opinions of the California Supreme Court appear at 30 Cal.3d 750, 31 Cal.3d 243, 31 Cal.3d 424, 180 Cal.Rptr. 489, 640 P.2d 108 (1982). The opinion, plus modification, appears as Appendix A. The order denying petition for rehearing is unreported and is attached as Appendix B.

STATEMENT OF JURISDICTIONAL GROUNDS

This Court's jurisdiction arises under 28 U.S.C. § 1257(2) from a final judgment of the California Supreme Court originally issued on February 8, 1982, as modified on May 6, 1982. Timely petitions for rehearing were duly filed on February 23, 1982, and May 21, 1982. On June 3, 1982, the California Supreme Court ordered the second petition for rehearing stricken, denying rehearing on its own motion. Notice of appeal was

timely filed within 90 days of June 3, 1982, on July 14, 1982 (Appendix G).

This proceeding was initiated by appellee ex parte. The record has been deemed "confidential." The petition for rehearing filed in behalf of the People by the California Attorney General on February 23, 1982, following publication of State Supreme Court's opinion, thus created the first opportunity for the People's constitutional claims to be heard. See Herndon v. Georgia, 295 U.S. 441, 444 (1935); Brinkerhoff-Farris Co. v. Hill, 281 U.S. 673, 677-688 (1930). In that petition, the People maintained that the State Supreme Court's construction of California Penal Code section 987.9 rendered the statute repugnant to the United States Constitution. Specifically, it was argued to the court below that, as construed, Penal Code

section 987.9 offended the First Amendment by denying the public their rights to know about, discuss, and attend criminal trial proceedings, and by sealing the record of those proceedings denied the public their right of access to judicial records. It was further maintained that the People's due process rights to notice and the opportunity to be heard were infringed by the secretive proceedings which had been held before the California courts. Accordingly, this Court's appellate jurisdiction has been properly invoked. 28 U.S.C. § 1257(2); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61 n.3 (1963); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 288-289 (1921). The California Supreme Court has ruled that defense counsel in capital cases can move ex parte for the appointment of a second attorney, and that the making and

the hearing of the motion will then be sealed as confidential.

There will be further trial proceedings in this case. Still, the judgment of the California Supreme Court is final for purposes of its rulings on the confidential appointment of counsel. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 485-488 (1975). For under those rulings, criminal defendants will from now on be able to move clandestinely for the appointment of publicly paid defense attorneys. The record of those proceedings will, under the State Supreme Court's decision, then be hidden from public view. Obviously, there will be no opportunity for the People to learn of such defense motions in future cases since the motions will not be made public. This case thus presents the first and last chance for constitutional

challenges in this Court to the procedures allowed by the California Supreme Court.

This Court's review of the unprecedented rulings in this case (cf. In re Oliver, 333 U.S. 257, 266 (1948)) is necessary because the People of the State of California have been denied their federally guaranteed rights. Under the laws of Congress, no court of the United States other than this Court can reverse or modify the California Supreme Court's judgment for errors of constitutional magnitude. See Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-416 (1923). It is on these grounds that the People invoke this Court's jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. 1; U.S. Const., Amend. 14; California Penal Code, secs.

987, 987.1, 987.2, 987.3, 987.4, 987.6, 987.8, 987.9. The text of these provisions appear at Appendix C.

STATEMENT OF THE CASE

Because the record in this case has been sealed from public view, this Statement is based on the matters of public record contained in the opinions of the California Supreme Court, the orders of that court which have been made public, and the responsive pleadings filed in the action by the California Attorney General.

According to the opinion of the court below, the appellee, Maurice John Keenan, stands accused of murder and six other felonies. Arraigned in October of 1979, he awaits trial on those charges, for which the death penalty has been sought. The present attorney representing appellee was appointed by the court in October of 1980, after a conflict

arose between Keenan and his first court-appointed attorney. As of this date, the case has been delayed from going to trial for over two and one-half years while issues relating to Keenan's court-appointed attorneys have been litigated.

Keenan's attorney moved secretly for state funds to hire experts, investigators, and a second attorney.[2/] A total of $23,000 was given the defense, but the superior court judge refused to award funds for second counsel. This refusal on the part of the superior

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2. These motions were purportedly made on the authority of California Penal Code section 987.9, which permits confidential defense requests for funds to employ experts, investigators and others necessary for the preparation or presentation of the defense in capital cases. Such requests are made before a judge of the superior court other than the judge assigned to the trial of the capital cases in question (See Appendix C).

court was sustained by the California Court of Appeal in a secret written opinion, after appellee petitioned that court for ex parte review.[3/] Review was then sought before the California Supreme Court, which on February 8, 1982, issued its original opinion ordering the superior court to appropriate funds for second counsel, while holding, under the authority of section 987.9, that both the application for such funds and the contents of the application would remain confidential. 30 Cal.3d supra at 753 n.5; 180 Cal.Rptr. supra at 491 n.5; 640 P.2d supra at 110 n.5.

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3. Though the secret opinion has been sealed and cannot be examined, the dissenting opinion of Justice Richardson of the California Supreme Court quotes Justice Rouse's reasons for sustaining the superior court judge's decision. 31 Cal.3d supra at 254 and 435; 180 Cal.Rptr. supra at 495; 640 P.2d supra at 1143.

Following publication of the Supreme Court's opinion, the People filed their first petition for rehearing on the ground, among others, that as construed by the California Supreme Court, Penal Code section 987.9 violated due process and the First Amendment to the United States Constitution.[4/]

On May 6, 1982, the California Supreme Court modified its opinion. Although holding that Penal Code section 987.9 did not authorize the expenditure of State funds for defense counsel, so that this statute would not apply to motions for second counsel, the court nevertheless used that statute's provision for confidentiality "by analogy" to the making and the hearing of a defense motion for the appointment of counsel.

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4. A copy of the People's February 23, 1982, petition for rehearing is separately appended to this Jurisdictional Statement as Appendix D.

31 Cal.3d supra at 249 and 430; 640 P.2d supra at 111.[5/] The justification stated for allowing the motion to be made confidentially was the avoidance of "undue disclosure of defense strategy." Ibid. The opinion as modified, indicated for the first time the court's determination that the People should not be a real party in interest in this proceeding. Compare 30 Cal.3d supra at 753 n.5 and 180 Cal.Rptr. supra at 491 n.5 with 31 Cal.3d supra at 247 n.5 and 31 Cal.3d supra at 428 n.5.

The court's opinion also created a presumption that in cases of "genuine need," a second attorney must be appointed, holding that this presumption was not rebutted here. 30 Cal.3d supra

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5. Since the California Supreme Court's rule of confidentiality in this case is of a legislative nature, it may be considered to be a statute for purposes of 28 U.S.C. § 1257(2). Lathrop v. Donahue, 367 U.S. 820, 824 (1961).

at 759; 31 Cal.3d supra at 253; 31 Cal.3d supra at 434; 180 Cal.Rptr. at 494; 640 P.2d supra at 114.

On May 21, 1982, the People filed a second petition for rehearing asserting that the State Supreme Court had created a species of confidential proceedings wholly unauthorized by law, and that the People's dismissal from this case, absent notice and the opportunity to be heard, was violative of due process of law.[6/] Appellee moved to strike the People's rehearing petition, with the People opposing this motion. The People's opposition was marked "Received" by the California Supreme Court, but before any action was taken, the court ordered the second rehearing

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6. The second petition for rehearing is also separately appended as Appendix E.

petition stricken and denied rehearing on its own motion.[7/]

REASONS WHY THE QUESTIONS PRESENTED DESERVE PLENARY CONSIDERATION BY THIS COURT

The California Supreme Court has in this case tipped the balance on the scales of justice in favor of criminal defendants without any justification whatsoever. Instead of an adversary system of justice, California now sanctions a form of reverse Star Chamber procedure in which the People, including their legal representatives, are denied their rights to attend criminal trial hearings. Only the defense side is heard by the courts, with the records of those proceedings then being labeled confidential and sealed from public view.

Review in this Court is necessary

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7. The People's motion is separately appended as Appendix F.

because, if left uncorrected, the People of the State of California will have been denied the rights guaranteed them under the First Amendment to know what happens at criminal trial proceedings, in order that they may freely discuss this aspect of their governmental affairs. The ruling of the California Supreme Court in this case raises substantial federal questions as it takes giant strides beyond what this Court has ever allowed in terms of closing the public's courtrooms. The State Supreme Court has, in the context of motions for the appointment of criminal defense counsel, created a blanket rule forbidding any public access to those proceedings. This mandatory-closure rule is contrary to this Court's decision of June 23, 1982 in Globe Newspaper Co. v. Superior Court for the County of Norfolk, 50 U.S.L.W. 4759,

which requires a case-by-case determination of the need for denying public access to criminal proceedings.

Moreover, in disregard of the public's right of access to judicial records, recognized since Common Law, the decision in this case orders that records of judicial proceedings on the appointment of criminal defense counsel be sealed under a cloak of confidentiality. Henceforth, motions seeking appointment of criminal defense attorneys will be made secretly, and the public may not even be apprised of one of the most significant pieces of information about a criminal trial--who represents the accused. No limits have been placed on the California courts' power to determine what judicial records should be confidential.

The California Supreme Court has also devised a rule of law presuming

that two defense attorneys are necessary in this case, while at the same time precluding any rebuttal of this court-made presumption. This ruling raises the substantial federal question of whether the People of a State are denied due process of law because a presumption permitting no opposition is, in fact, illusory because it is irrebuttable.

While ostensibly posing as the guardian of criminal defendants accused of capital crimes, the California Supreme Court has trenched upon the fundamental rights of the State's citizens. The balance, which must be kept true (Snyder v. Massachusetts, 291 U.S. 97, 122 (1933)), has been shifted dangerously to favor the minority accused of criminal wrongdoing at the expense of the law-abiding majority. Unless unrestrained judicial authority be allowed to make the People's rights

under the United States Constitution superfluous in California, the judgment in this case must be reversed.

ARGUMENT

1. This Court has very recently held that the First Amendment forbids denying the public access to criminal trial proceedings based on a mandatory rule not allowing for the particularized consideration of individual cases. Globe Newspaper Co. v. Superior Court, etc., supra. Rather, there must be a case-by-case determination that the denial of public access is "necessitated by a compelling governmental interest and is narrowly tailored to serve that interest." 50 U.S.L.W. at 4762. This decision gives recognition to the public's First Amendment's right of access to criminal trials, necessary to ensure that there is informed discussion of governmental affairs. Id. at 4761.

This case involves the important phase of a criminal trial where indigent criminal defendants have lawyers appointed by a State court to represent them. See Gideon v. Wainwright, 372 U.S. 335 (1963). Under the ruling challenged in this case, motions seeking the appointment of second counsel in capital cases are to be automatically made in secret, without notice to the prosecution, the public in general, or the press. The only interest identified by the California Supreme Court in support of this blanket exclusionary rule is "[t]o avoid undue disclosure of defense strategy, ..." 31 Cal.3d at 249 and 430; 640 P.2d at 111.

This reasoning, however, does not justify keeping the motion itself, as opposed to any hearing on that motion, confidential. Simply knowing that a criminal defendant has moved to have

additional counsel appointed at public expense does not disclose any defense strategy to the prosecution. If, in individual cases, a trial judge decides that a hearing on the motion made in public session would result in undue disclosure of defense strategy, then the judge can order that portion of the hearing held in camera. The court's ruling on the motion would then be made in public session. Such individualized consideration of the need to hold an in camera hearing comports with this Court's decision in Globe Newspaper Co. requiring that "where the State attempts to deny the right of access to inhibit the disclosure of sensitive information, it must be shown that the denial is ... narrowly tailored to serve that interest." 50 U.S.L.W. supra at 4762. The present ruling of the California Supreme Court is not narrow, but all-

encompassing. Regardless of the circumstances, the mere making of a defense motion for co-counsel is held to require confidentiality. As a mandatory rule that applies automatically, the decision of the California Supreme Court is unconstitutional.

2. Although we believe that Globe Newspaper Co., alone, warrants summary reversal of this case for reconsideration in light of that opinion, there are additional reasons why the judgment of the California Supreme Court is repugnant to the United States Constitution. This case does not come before this Court, "encased in the armor wrought by prior legislative deliberation" (Bridges v. California, 314 U.S. 252, 260 (1941)), since the California Legislature has not authorized ex parte proceedings of the kind permitted here. Absent any legislative directive, the California

Supreme Court has, by analogy to Penal Code section 987.9, effectively legislated into law that statute's trappings of confidentiality, denial of both notice and the opportunity to be heard, and the sealing of judicial records. This Court long ago recognized that illegitimate and unconstitutional practices like the ones at issues here get their first footing by silent approaches and slight deviations from legal modes of procedure. Boyd v. United States, 116 U.S. 616, 636 (1886). If a court can order that motions for court-appointed counsel are to be made ex parte, absent any legislative authorization, then that court can decide to consider other motions ex parte without allowing opposition. The proceedings can then be ordered sealed as "confidential," so that the public never learns about the court's

actions. This should not be permitted in a democratic society.

The rule of State law fashioned by the California Supreme Court, moreover, indiscriminently allows defense counsel in criminal cases to move ex parte for second counsel without any showing of necessity. Such ex parte proceedings should be exceptional and tolerated only in cases of manifest necessity. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164-165 (1951) (Frankfurter, J. concurring). There has been no showing of a need in this case to have motions for counsel made ex parte. It should be axiomatic that "[t]he people of a state are also entitled to due process of law." Stein v. New York, 346 U.S. 156, 196-197 (1952); see Fay v. New York, 322 U.S. 261, 288-289 (1946). Under our adversary system of criminal justice, it is

"the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." United States v. Nixon, 418 U.S. 683, 707 (1973). California's judiciary should be held to no lesser standard in which justice becomes a one-way street for criminal defendants. A democratic government must practice fairness; and fairness can rarely be obtained by secret, one-sided determinations. Fuentes v. Shevin, 407 U.S. 67, 81 (1972). It is the People's contention that where no need has been demonstrated for requiring ex parte consideration of a criminal defendant's motion for a second court-appointed attorney, then the consequent denial of the public's First Amendment and due process rights cannot be sustained. There is simply no place within the area of basic freedoms guaranteed by the First Amendment for ex parte orders without

giving the opposing party an opportunity to participate. Carroll v. Princess Anne, 393 U.S. 175, 180 (1968).

3. In Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-598 (1978) this Court acknowledged the existence of a Common Law right of access to judicial records. See generally Application of National Broadcasting Co., Inc., 635 F.2d 945, 949 (2d Cir. 1980). In the absence of any statute restricting the public's right of access to judicial records, there is a presumption in favor of such access. Nixon v. Warner Communications, Inc., 435 U.S. supra at 602. This right of access can be circumscribed only after careful scrutiny and weighing of the counterbalancing interests offered in opposition to it. Ibid. Here, no State statute has authorized the secreting of Keenan's applications

for counsel. There has been no weighing or balancing of the justifications, if any, for keeping those applications hidden. Only judicial edict has had that effect. On this score, too, the People would contend that the public's First Amendment rights to know the business of their public servants in the judiciary have been unconstitutionally abridged.

The American Bar Association's Special Committee on Minimum Standards for the Administration of Criminal Justice has recommended that whenever all or any part of a pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings should be kept and made available to the public following the completion of trial or disposition of the case without trial. ABA Standards for Criminal Justice, sec. 3.1, Pretrial Hearings.

The commentary to this section states:

> "Moreover, and this is an essential aspect of the recommendation, a complete record of the proceedings from which the public is excluded must be kept and must be made available at the completion of trial or disposition without trial. This is designed to ensure full public awareness and discussion of any alleged impropriety in the proceedings themselves." (Emphasis in original.)

Permitting ex parte proceedings to be held, and then sealing the record from public view, first ensures public ignorance of the proceedings, and next assures that there will never be awareness or discussion of anything improper

in the proceedings themselves.

The reasons why the People must know about a criminal defendant's motions for court-appointed counsel are readily apparent. Should the defendant be convicted, and on appeal or in subsequent collateral attack of the judgment should he challenge the competency of his trial attorney, then the State would be obliged to defend defense counsel's conduct in handling the trial. How, we ask, can counsel's conduct be defended if there have been a series of ex parte communications with the court that are deemed confidential? If trial counsel somehow feels inadequate for the task, then this should be known. The potential for mischief inherent in allowing the kind of ex parte motions permitted here should give one pause to ponder the wisdom of ordering the record in this class

of cases sealed. At the very least, the People should be apprised that there was a motion by counsel.

Yet, under the present ruling of the California Supreme Court, because the record of a defense motion has been sealed, the People might not even know the identity of counsel appointed by the court, much less whether that individual was, for example, a member of the State Bar. Counsel's identity is unlike that of a potential defense witness, whose identity might reveal something of a privileged nature. No privilege attaches to the fact that an attorney has been appointed for a client, since "[t]he fact that a lawyer is appearing in a representative capacity must always be out in the open." Wise, Legal Ethics (1970) at 334. To our knowledge appointments of counsel have never before been regarded as matters which

can be accomplished in secret proceedings. If, indeed, court-appointed counsel will eventually be "of record," so that all may know his or her identity, then the question arises: What is the need for the prior restraint on this information? This Court has accorded the most exacting scrutiny to prior restraints on First Amendment freedoms, with those restraints bearing a heavy presumption against their constitutional validity. Smith v. Daily Mail Publishing Co., 433 U.S. 97, 102 (1979); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). It remains a mystery, absent any attempt at explanation, why the mere making of a defendant's motion for a second court-appointed attorney must be done in camera on an ex parte basis, with the record then sealed from public view.

4. Furthermore, there is the matter of the California Supreme Court's creation of what seems to be an evidentiary presumption that in cases of "genuine need" a second attorney should be appointed. This presumption, in turn, winds up as an empty promise. In an ex parte proceeding, where no notice is given and no opposition is permitted, the presumed need for a second attorney cannot be rebutted. Due process of law should require that before the public's property interest, in the form of tax dollars, are taken away via a presumption, there should be a chance for rebuttal. That is impossible under the present ruling of the California Supreme Court. This Court has repeatedly held that presumptions denying a fair opportunity for rebuttal violate the due process clause of the Fourteenth

Amendment. Vlandis v. Kline, 412 U.S. 441, 446 (1973).

5. The decision in this cases stands alone in Anglo-American jurisprudence. Never before in any reported decision has a court secretly appointed counsel to represent a criminal defendant. The California Supreme Court here has been able to accomplish this result by the admitted misapplication of a statute never intended for this use by the California Legislature. The unprecedented decision in this case robs the People of the State of California of their valued federal constitutional rights, without discernable benefit to the criminal accused except in the closing of court hearings from public scrutiny or opposition. We appeal to this Court, in its role as the protector of constitutional guarantees, to prevent

this erosion of the People's rights. While a decision appointing a second defense counsel in a capital case may not, in and of itself, be a troublesome prospect, the procedures to be employed under this case when doing so raise grave concerns surrounding the restrictions on the public's rights to know about and participate in their governmental affairs in a free society. Openness, rather than stealth, should be the basis upon which our criminal court system operates.

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CONCLUSION

The judgment in this case should be reversed summarily for further proceedings in light of Globe Newspaper Co., supra. Alternatively, full briefing should be required, the case set for oral argument, and the judgment reversed.

DATED: July 16, 1982

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